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No. _____

In The

Supreme Court of the United States

ALLAN J. NORVILLE AND ALFENA A. NORVILLE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

GERALD MALTZ
Counsel of Record
HARALSON, MILLER, PITT & MCANALLY, P.L.C.
One South Church Avenue, Suite 900
Tucson, Arizona 85701-1620
(520) 792-3836

G. LAWRENCE SCHUBART
STUBBS & SCHUBART, P.C.
340 North Main Avenue
Tucson, Arizona 85701-0547
(520) 623-5466

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit's standard for reviewing new trial orders conflicts with Rule 59 of the Federal Rules of Civil Procedure and the standard applied in other circuits.

2. Whether the Ninth Circuit correctly endorsed the practice of a district court judge testifying as a partisan witness in his own court in the absence of a compelling need.

3. Whether the Ninth Circuit's reinstatement of a condemnation award that is below the lowest opinion of just compensation admitted in evidence, and that fails to award conceded severance damages because a landowner expressed an interest in selling to the government, does not satisfy the constitutional guarantee of just compensation and conflicts with decisions in other circuits and a decision of this Court.

4. Whether the trial court's "gatekeeper" discretion with respect to the admission of expert testimony, as delineated in *Kumho Tire Co. v. Carmichael,* 119 S.Ct. 1167 (1999), extends to that court's deciding whether to grant a motion for new trial.

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TABLE OF ABBREVIATIONS

"Blue Br." refers to the government's opening brief in the court of appeals

"ER" refers to excerpts of record in the court of appeals

"Ex" refers to a trial exhibit

"Red Br." refers to the Norvilles' brief in the court of appeals

"RT" refers to the reporter's transcript

"SER" refers to the supplemental excerpts of record in the court of appeals

PETITION FOR A WRIT OF CERTIORARI

Allan J. and Alfena A. Norville petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The court of appeals' opinion is reported at 175 F.3d 1133 (9th Cir. 1999) (B. Fletcher, SCJ, joined by Tashima, CJ, and Fitzgerald, DJ), and is reproduced in the attached appendix.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). A timely petition to the Ninth Circuit for panel rehearing and for rehearing en banc (supported by an *amicus* from the Appraisal Institute) was denied on July 14, 1999. The judgment of the court of appeals was entered on July 22, 1999.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

1. Fed.R.Civ.P. 59 provides, in pertinent part, that a new trial may be granted "for any of the reasons for which new trials have heretofore been granted in actions of law in the courts of the United States. . . . "

2. The Fifth Amendment of the United States Constitution, provides, in pertinent part, that "No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."

3. Fed.R.Evid. 702 provides, in pertinent part, that "a witness qualified as an expert . . . may testify . . . in the form of an opinion. . . . "

4. Fed.R.Evid. 403 provides, in part, that the district court may exclude relevant evidence if its probative value is outweighed by "the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . . "

STATEMENT OF THE CASE

The first verdict in this condemnation case was below the lowest admitted opinion of just compensation and it also failed to award severance damages despite the unanimous opinion testimony that the taking resulted in such damages. The verdict was the product of testimony by a sitting United States District Judge, in his own court, that was proffered by the government for purported "impeachment" purposes only, *i.e.*, allegedly to attack the credibility of one of the landowners as to whether he "wanted" a federal courthouse on his property.

The landowners moved for a new trial. The trial judge (Jack D. Shanstrom, Chief Judge of the District of Montana, sitting by designation) found that the verdict was (a) against the weight of the evidence, (b) outside the range of qualified opinion testimony, (c) against the

"overwhelming" evidence of severance damages, and that (d) the judicial testimony should not have been admitted, was improperly used by the government, and had proven to be unfairly prejudicial (ER 280-81). As a result of all of the foregoing, the trial judge concluded that the verdict was a "miscarriage of justice" (ER 281) and granted the motion.

The new trial, from which the judicial testimony was excluded, resulted in a verdict within the range of appraisal opinion and awarded severance damages.

A. The decision below

The Ninth Circuit reversed the trial court's decision to grant a new trial and instructed it to reinstate the first verdict. Although the panel recited the correct abuse of discretion standard of review, and acknowledged that a federal trial judge has discretion to grant a new trial even if substantial evidence supports the verdict (App. 10), the panel actually engaged in a *de novo* review of the evidence, found that it supported the verdict, and concluded that if the reviewing panel believes that a "verdict is not against the clear weight of the evidence," a district court necessarily "abuses its discretion in ordering a new trial" (App. 20).

With regard to the judicial testimony that the district court found unduly prejudicial, and expert testimony that the district court found was of no probative value, the Ninth Circuit panel concluded that the testimony was relevant and supportive of the verdict and, therefore, precluded a new trial (App. 13-14). In holding that the district court erred in granting a new trial, the panel

accorded no deference whatever to the trial court's determination that a combination of factors had resulted in a "miscarriage of justice" at the first trial.

B. The taking and conceded severance damages

The property taken on October 25, 1995, was a four-acre corner which was part of an eleven-acre larger parcel at a major intersection in the Central Business District of Tucson, Arizona. The property is situated at the western gateway into the downtown core, a block east of Tucson's only freeway. The property was taken by the government for construction of an $82 million courthouse and federal building complex. On September 27, 1996, the General Services Administration ("GSA") publicly disclosed the design and specifications of the complex: 413,000 gross square feet and 150 feet high. The building complex consumes all frontage along the gateway street. The seven-acre remainder is literally behind massive structures, lacking any frontage on the gateway street or the corner.

At the first trial, the government's appraiser concluded that the seven-acre remainder "will no longer be a corner parcel with vehicular access and exposure from [the intersecting streets] except for pedestrian access. It will be an interior parcel with access and exposure from [a secondary or collector street] only" (Ex 23; SER 67). Every one of the six licensed real estate appraisers who appraised the property in the "before" and "after" taking conditions agreed that there were severance damages as a result of the taking. No witness at either trial testified to the contrary. The district court stated the obvious when it observed that the evidence of severance damages was "overwhelming" (ER 280).

C. Judicial testimony

Allan J. Norville, one of the landowners, testified at the first trial. He did not offer an opinion as to the value of the remainder in the after condition. He was not asked (either on direct or cross examination) whether he ever spoke to United States District Judge William D. Browning, District of Arizona, Tucson Division, about locating a courthouse on the property. Nevertheless, the government called Judge Browning to testify in his own court as an undisclosed "impeachment" witness allegedly for the sole purpose of contradicting Mr. Norville's testimony that he did not want the courthouse complex at issue on his property (Blue Br. at 8/9; RT 274/16-275/1). Judge Browning testified that Mr. Norville spoke to him in 1993 and 1994, two years before the GSA first revealed the design and other specifics of the new complex, and suggested that the government construct a new courthouse on the property and co-venture construction of a parking structure. Judge Browning did not testify about any discussions with Norville about the federal complex as ultimately designed and located since that was not known at the time. He did not testify that either he or Norville discussed price, or values, or severance damages. As the district court observed, Judge Browning testified only about *a* courthouse not yet planned or designed (TR 9/23/97 at 8).

The government conceded in the Ninth Circuit that Judge Browning's testimony about Mr. Norville's suggestion was the likely reason that the jury did not award severance damages contrary to the unanimous opinion testimony (Blue Br. at 49). It further conceded that Judge Browning's testimony "may well have been prejudicial"

(*Id.* at 31), but argued – contrary to its own proffer "for impeachment only" – that it was *substantive* evidence of the absence of severance damages. The Ninth Circuit embraced that argument and published it as law (App. 13-14). The panel did not address the issues raised by the Norvilles and the district court as to the propriety of Judge Browning testifying on behalf of the government in his own court.

D. The range of testimony

The government's only witness at the first trial who offered an opinion of market value and just compensation testified that just compensation amounted to $3.2 million (App. 4). That was the *lowest* admitted opinion of just compensation. The range of testimony was $3.2 million to $14.6 million (*Id.*). The jury's "just compensation" verdict was $2.5 million (*Id.* at 6).

REASONS FOR GRANTING THE PETITION

SUMMARY OF ARGUMENT

1. Motions for new trial are regularly made in the district courts. It has long been established that the trial judge has the right, and indeed the duty, to order a new trial to remedy what the judge perceives to be a miscarriage of justice. Rule 59, and cases in circuits other than the Ninth Circuit, recognize multiple grounds for the granting of a new trial and other circuits correctly accord substantial deference to the trial court's discretion in ruling on such motions. However, the Ninth Circuit's opinion recognizes only a single ground for granting a

new trial (the weight of the evidence), and reviews *de novo* the trial court's new trial order as if it were an order granting judgment rather than a new trial.

Litigants in the Ninth Circuit should be accorded the same rights as litigants in other circuits, and all the rights contemplated by Rule 59, in moving for a new trial. District judges in the Ninth Circuit should be accorded the same deference as in other circuits, as contemplated by Rule 59. This Court should grant review in order to resolve the conflict created by the Ninth Circuit decision in this case and reaffirm the substantial deference to the trial court that is supposed to be the hallmark of abuse-of-discretion review.

2. The Ninth Circuit's unqualified endorsement of the judicial testimony in this case impacts on this Court's ultimate supervisory responsibility for the conduct of district judges. Here, a sitting federal district judge (and former chief judge) appeared as a partisan witness on behalf of the government to attack the character of the landowner when the only issue in the case was the character of the subject property and its market value. The Court should grant review in order to establish a presumption against the admission of judicial testimony except where there is a compelling need. No such need was present in this case.

3. Fundamental damage concepts and standards for federal takings should be uniform among the circuits and consistent with the constitutional guarantee of just compensation. The Ninth Circuit has deviated from those concepts and standards with regard to severance damages and the need for a just compensation verdict to lie

within the range of testimony before the court. Its decision on severance damages is inconsistent with a prior decision of this Court and antithetical to the very concept of severance damages being market determined rather than the result of the subjective mind-state of the landowner. Its attempt to avoid the range of testimony rule creates a conflict among the circuits and invites speculative jury verdicts that the opinion below places beyond the discretion of the district court to remedy.

4. The Ninth Circuit did not defer to the district court's evaluation of the probative value of expert testimony in granting a new trial. For all the reasons mentioned in *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167 (1999), the deference accorded the district court's admission of expert testimony should extend to that court's decision whether or not to grant a new trial.

ARGUMENT

I. THE NINTH CIRCUIT'S APPLICATION OF THE STANDARD OF REVIEW OF ORDERS GRANTING A NEW TRIAL CONTRAVENES RULE 59 AND CONFLICTS WITH DECISIONS IN THE MAJORITY OF CIRCUITS.

In reversing the trial court's grant of a new trial, the Ninth Circuit held that the district court has no discretion to grant a new trial unless the verdict is "against the clear weight of the evidence" (App. 20). In so holding, the panel relied upon an earlier Ninth Circuit decision, *Roy v. Volkswagen of America, Inc.*, 896 F.2d 1174 (9th Cir. 1990), *amended*, 920 F.2d 618 (1991), where the court held that a

"district court may order a new trial *only* if it finds that the jury's verdict was clearly contrary to the weight of the evidence." 920 F.2d at 619 (emphasis added). Fed.R.Civ.P. 59 contains no such limitation. Rather, it provides that a new trial may be granted "for any of the reasons for which new trials have heretofore been granted in actions at law in the court of the United States . . . " (59(a)). That includes verdicts that are unreasonably high or low, and verdicts that are otherwise unjust for "all of the reasons which inhere in the integrity of the jury system," notwithstanding substantial evidence to support the verdict. 11 Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2807 at 82-84 (2nd Ed. 1995) (unreasonably high or low), § 2806 at 68 ("all the reasons which inhere in the integrity of the jury system"), at 65 (even though there is "substantial evidence" to support the verdict) and cases cited.

The district court may act either on motion, or *sua sponte*. Rule 59(d). It is not required to view the evidence favorably to the verdict-winner, but is free to weigh the evidence for itself. Wright, Miller & Kane, § 2806, at 66-67 and cases cited. Ultimately, the decision whether or not to grant a new trial invokes the discretion of the trial court to prevent the entry of judgment on what that court deems to be an unjust verdict. That discretion should be accorded substantial deference in view of the trial court's superior position in having observed the witnesses and the jury, whereas the court of appeals has only the "cold record." Wright, Miller & Kane, § 2801, at 40-41, § 2803, at 45-46, 47-48 and cases cited.

Circuits other than the Ninth Circuit have recognized multiple grounds for granting a new trial and have

accorded substantial deference to a district court's discretion in making that decision. *E.g., Payton v. Abbott Labs*, 780 F.2d 147, 152 (1st Cir. 1985) (decision may be based upon false evidence, or on "some trial error," or prejudicial statements); *Santa Maria v. Metro-North*, 81 F.3d 265, 273 (2nd Cir. 1996) (decision may be based on damages that are excessive "or that for other reasons, the trial was not fair to the moving party"); *Hourston v. Harvlan, Inc.*, 457 F.2d 1105, 1107 (3rd Cir. 1972) (decision may be based on evidence improperly admitted or prejudicial statements of counsel); *Juneau Square Corp. v. First Wisconsin N.B.*, 624 F.2d 798, 806-07 n. 11 (7th Cir. 1980) (district court may order a new trial if it deems it in the interest of justice to do so; reviewing court should not substitute its judgment for the district court's discretion); *MacPherson v. University of Montevallo*, 922 F.2d 766, 776-77 (11th Cir. 1991) (motion may be granted for improperly admitted evidence, or if verdict is result of jury confusion, or lack of probative value of admitted expert testimony).

In *Transok Pipeline Co. v. Darks*, 565 F.2d 1150 (10th Cir. 1977), the court affirmed the grant of a new trial because the verdict was near the outside range of expert opinions of value. In *Smith v. Transworld Drilling Co.*, 773 F.2d 610 (5th Cir. 1985), the court held that where the evidence is controverted, it will affirm a new trial order even if "on our own review of the 'cold record' we are not convinced that the jury verdict was against the great weight of the evidence." 773 F.2d at 613. It is sufficient that, in view of possible considerations not apparent from the written record, "we can perceive a sound basis for the trial judge's finding the verdict against the great weight of the evidence." *Id.* The Fifth Circuit recognizes multiple

grounds in addition to "against the weight of the evidence" for granting a new trial, including the rational conviction of the trial judge that the trial or verdict was not fair. *Id.* "Rule 59 of the Federal Rules of Civil Procedure confirms the trial court's historic power to grant a new trial based on its appraisal of the fairness of the trial and the reliability of the jury's verdict." 773 F.2d at 613.

Here, proper application of the abuse of discretion standard of review required the Ninth Circuit to answer only one question: whether there was a rational basis for the trial court's conclusion (not whether the Circuit agreed with that conclusion) that a "miscarriage of justice" resulted from a verdict that was below the lowest admitted opinion of value, that failed to award an element of damages (severance damages) that was conceded by experts for both sides, and that was the likely result of the prejudicial impact of judicial testimony on a collateral issue. The Ninth Circuit, however, engaged in *de novo* review of the new trial order as if the trial court had entered judgment as a matter of law. The panel disregarded those things in the record that had led the trial judge to conclude that a new trial should be granted and, instead, reversed the trial court's decision because, *in the panel's view*, "[w]hen the evidence is viewed in its entirety, the jury award was consistent with the weight of the evidence" (App. 12-13). The Ninth Circuit completely disregarded the discretion of the trial judge to grant a new trial even if substantial evidence supported the verdict and it also disregarded the superior position of the trial judge – who inspected the property, observed the witnesses, and observed the jury – to determine whether

the verdict was fair. The Ninth Circuit simply substituted its own judgment for that of the trial court's based upon its reading of the cold record and nothing more. In so doing, the Ninth Circuit has placed itself in conflict with every other Circuit that has applied the abuse of discretion standard.

II. THE NINTH CIRCUIT'S UNQUALIFIED ENDORSEMENT OF JUDICIAL TESTIMONY UNDERMINES THE POLICY OF JUDICIAL INDEPENDENCE. THIS COURT, IN THE EXERCISE OF ITS SUPERVISORY JURISDICTION, SHOULD RESTRICT OR STRONGLY CAUTION AGAINST THE USE OF SUCH TESTIMONY.

The district court's conclusion that Judge Browning's testimony should not have been admitted was the result of a Rule 403 evaluation based upon that court's personal observation of how the testimony was used, how it impacted the jury, as well as on the inherent prejudice involved in judicial testimony. The trial judge stated that the prospect of Judge Browning testifying caused him "a great deal of concern and anxiety" (RT 679/4-9). He observed that Judge Browning testifying in his own court places "a powerful, powerful person" on the stand (447/4-5). The district court reluctantly admitted that testimony for only "impeachment" purposes (679/4-9). After the constitutionally inadequate (and punitive) verdict, the district court stated that, on reflection, it should not have admitted the testimony, especially in light of "the way the evidence was used" by the government, which used it as substantive evidence to negate the "overwhelming" evidence of severance damages (ER 281).

The district court explained the basis of its exercise of discretion in granting a new trial: "the briefs that had been filed in this matter," "my recollection of the trial," and "portions of the transcript that I have . . . " (ER 280). The Ninth Circuit disregarded the explanation. The district court did *not* state that it was basing its decision on a newspaper article as the Ninth Circuit panel surmised. The district court's passing mention of an *unidentified* newspaper article, which is *not* part of the district court record, was dismissive (reminding counsel that the court did not debrief the jury).

The district court's position with respect to Judge Browning as a witness was further clarified when the court explained its reasons for excluding Judge Browning as a witness at the second trial in using the language of Rule 403: "As this Court has *previously determined* the probative value of Judge Browning's testimony is substantially outweighed by the danger of unfair prejudice" (ER 310) (emphasis added). The Ninth Circuit's reversal of this decision is the only published circuit court opinion we have found overruling a trial court's Rule 403 decision.[1]

The district court's recognition of the inherent prejudice of judicial testimony, which it observed at the first

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[1] When he testified, Judge Browning was one of three active district judges in Tucson. He had just completed his tenure as chief judge of the District. He was on the courthouse site selection committee and he gave interviews to the local press. He, and all the other district judges in Tucson, recused themselves from participating in the decision of the case.

trial, is a matter which the Ninth Circuit completely ignored. The judiciary should be independent and above the fray. *See* Canon 2 of the Code of Conduct for United States Judges. Judicial testimony should ordinarily be avoided because such testimony "may be misunderstood to be an official testimonial" of the tribunal (see Canon 2(B) Commentary and cases cited in Red Br. at 51). The Ninth Circuit panel made no reference whatever to the Canons, to the ordinary presumption against judicial testimony or to whether there was a compelling reason to disregard that presumption in this case.

Cases that have wrestled with the issue of judicial testimony focus on whether it is indispensable. *See, e.g., United States v. Krenzelok*, 874 F.2d 480, 482 (7th Cir. 1989) (no abuse of Rule 403 discretion where testimony was indispensable to case); *Hirschberger v. Sullivan*, 609 N.E.2d 1301, 1306 (Ohio App. 1992), citing *Joachim v. Chambers*, 815 S.W.2d 234 (Tex. 1991); *Cornett v. Johnson*, 571 N.E.2d 572 (Ind. App. 1991). Where, as here, such testimony was clearly not indispensable, the Ninth Circuit's unqualified endorsement of such testimony dangerously undermines the policy of judicial independence. As the trial court observed, Judge Browning's testimony effectively, and improperly, turned the first trial into a credibility contest between the landowner and a sitting member of the court in which the case was being heard. That trumped the real issue, *i.e.*, the value of the subject property.

III. THE NINTH CIRCUIT'S REJECTION OF THE RANGE OF TESTIMONY RULE AND HOLDING THAT A LANDOWNER'S ALLEGED INTEREST IN HAVING A GOVERNMENT PROJECT ON HIS PROPERTY IS SUFFICIENT TO DEFEAT AN AWARD OF SEVERANCE DAMAGES ARE INCONSISTENT WITH DECISIONS IN OTHER CIRCUITS, A DECISION OF THIS COURT, AND THE CONSTITUTIONAL GUARANTEE OF JUST COMPENSATION.

A. The Ninth Circuit held that a new trial was not warranted in this case because the jury was entitled to conclude that severance damages should not be awarded since Mr. Norville, an experienced developer in Tucson, would not have sought a courthouse for his property "if he thought it would diminish the value of his remaining property" (App. 14). That conclusion is not supported by testimony or case law. It is also a *non-sequitur.* In the first place, when Mr. Norville expressed interest in locating a courthouse on the property, the plans for the complex were not yet determined. It would have been impossible for him at that time to know the effect on the remainder if only a part of the property were taken. In addition, even if he had known the precise plans for the complex, it would be reasonable for him to assume that he would receive compensation sufficient to reimburse him for his financial loss, as the Constitution requires.[2]

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[2] Mr. Norville in fact protested the government's site selection, as did the county government and others (Ex 43, SER 47, *et seq.*, 58 *et seq.*).

Moreover, if the Ninth Circuit's assumption were true, the converse should also be true, *i.e.*, a landowner's subjective desire *not* to have a given government project located on his or her land would be proof of the *existence* of severance damages. This Court has indicated otherwise. See *United States v. Miller*, 317 U.S. 369, 375 (1943). Severance damages is a *market place* determination (*Id.*). Such damages are not based upon the value of property to the landowner (*Id.*).

It was a dangerous mistake for the Ninth Circuit to hold that Judge Browning's testimony was sufficient to negate all appraisal evidence of the existence of severance damages. That holding provides precedent for future juries in condemnation cases to disregard all appraisal evidence of severance damages and, instead, render verdicts based upon the supposed subjective state of mind of the landowner or landowners. That doctrine conflicts with this Court's decision in *United States v. Miller*.

B. Given that evidence of "market value" is virtually always a matter of opinion, the "range of testimony" or "range of opinion" standard has been universally applied as a touchstone in testing whether a condemnation verdict is adequate.

> "If outside the range of the testimony, such [just compensation] awards have generally been set aside." 5 Nichols, *Eminent Domain* § 17.1[4], p. 17-21 (3rd Rev. 1996). "The range of the testimony concept has been held to apply to the before and after values as well as the final award of damages." *Id.* at p. 14, 1997 Supp. "An example of grounds for a new trial is where the

> jury award is outside the range of testimony." 7A Nichols, *supra*, § 19.03[3], p. 9-20. "The award may not be in excess of the amount claimed by the owner, nor should it be less than the lowest estimate of value testified to by a witness." 5 Nichols, *supra*, § 17.3, p. 17-41.

The rule that jury awards of just compensation must be within the range of expert testimony has been expressly applied in the First and Tenth Circuits and in many States. *E.g., United States v. 10,031.98 Acres*, 850 F.2d 634, 638 (10th Cir. 1988) (new trial where verdict outside the range of expert testimony); *United States v. 177.51 Acres*, 716 F.2d 78, 82 (1st Cir. 1983) ("scope of evidence rule" requires affirmance only if award "falls within the range of the value opinions offered by the adverse parties' expert witnesses"); *Flood Control District of Maricopa Cty. v. Hing*, 147 Ariz. 292, 709 P.2d 1351, 1359-60 (App. 1985). To the same effect as the cases expressly applying the range of testimony rule, are cases upholding awards of just compensation because they fall within the range of opinion testimony. *E.g., United States v. 47.14 Acres*, 674 F.2d 722, 725 (8th Cir. 1982); *United States v. 6,162.78 Acres*, 680 F.2d 396, 398 (5th Cir. 1982).[3]

Two exceptions to the range of testimony rule have been recognized – where there is a party admission of value or an expert commission finding (Blue Br. at 35-37).

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[3] In implicit recognition of the applicability of the range of testimony rule, the government sought an *additur* after the first trial in order to increase the verdict to its appraiser's opinion of just compensation. Federal practice, however, does not permit an *additur*; the only remedy for an inadequate verdict is a new trial. *E.g.*, 11 Wright, Miller & Kane, § 2807 at 82/84, § 2816 at 28.

Neither of those exceptions applies here. The single case cited by the court below (App. 15) as authority for rejecting the range of testimony rule, *United States v. 1,162.65 Acres*, 498 F.2d 1298 (8th Cir. 1974), involved an expert commission and was also not a true "range of opinion testimony" situation. There, the district court accepted an expert commission's valuation that was *within* the range of opinion testimony. The landowner appealed, alleging that the award was outside the range of the *landowner's* appraisals.

There is a fundamental distinction between an expert commission finding and a jury verdict with regard to the range of testimony rule. In an expert commission case, the fact finder is also an expert entitled to reject expert opinion offered by the parties. A lay jury, however, has only the expert opinion of witnesses as a basis for deciding fair market value. To permit a jury to disregard all expert opinion of market value in evidence is to disregard the fundamental precept that verdicts must be based upon the record. Market value is not part of the common sense of lay people.[4]

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[4] The Ninth Circuit cited data testified to by government witness Dilmore as sufficient to justify a below range of testimony verdict. However, nowhere in the record did Dilmore "derive a value" or provide an "estimate" of value as the panel suggests (App. 5). To the contrary, Dilmore expressly testified that he was not offering any opinions as to value and that it would be improper to argue the contrary (RT 1136/10-1137/1). Dilmore did not appraise the property, nor comparables used by other appraisers, nor did he even see the property. He merely calculated the mean and median of the government's litigation consultants' "adjustments" to certain comparable sales (RT 1116/15-1119/21).

Appraisal opinions are not merely "recommendations" as the Ninth Circuit held (App. 15). They are the only *evidence* of market value.

> "The correct method of adducing evidence of market value in a condemnation action is by suitably qualified witnesses who give their opinion as to the market value of the condemned property before and after taking." * * * The verdict "cannot be higher than the highest estimate of the expert witnesses nor lower than the lowest." 27 Am.Jur.2d, *Eminent Domain* § 676, pp. 215-16 (1996).

To denigrate that evidence to some lesser category, which can be disregarded by a lay jury, is to invite verdict by speculation. It is tantamount to saying that evidence admitted at trial is a mere "recommendation" that can be disregarded by the jury in favor of something not admitted in evidence. That cannot satisfy the constitutional guarantee of just compensation.

IV. THE NINTH CIRCUIT'S OPINION SUBSTITUTES APPELLATE JUDGMENT FOR DISTRICT COURT DISCRETION IN THE EVALUATION OF EXPERT TESTIMONY ON A MOTION FOR NEW TRIAL. "GATEKEEPER" DISCRETION SHOULD EXTEND TO DISCRETIONARY DECISIONS AFTER SUCH TESTIMONY IS ADMITTED.

The district court based its new trial decision in part on its belief that the testimony of one of the government's witnesses – Mr. Dilmore – did not support the jury's below range-of-testimony verdict because Dilmore was not "offering anything with respect to value. It was a non-opinion as to value" (ER 281). The Ninth Circuit did not defer to that finding. It reviewed, evaluated (and revised) Dilmore's testimony *de novo*.

The district court was the "gatekeeper" with respect to the admission of Dilmore's testimony. See *Kumho Tire Co. v. Carmichael* (where the government advocated the "gatekeeping" role in land valuation cases in its *amicus* brief at footnote 5 and accompanying text). When the court admitted Dilmore's testimony, it did so based upon only an expectation of what that testimony would contain. It was not until the district court heard the testimony and observed the witness that it was in a position to accurately evaluate the testimony in the context of the case. All of the reasons discussed in *Kumho* for vesting broad discretion in the district court concerning the admission of expert testimony apply with equal force to post-admission trial court decisions such as the disposition of a motion for new trial. Indeed, after having heard and observed the testimony, the district court is in an even better position than it was at the time of the offer of

the testimony to make such gatekeeper decisions. It follows that the same deferential standard of appellate review that applies to the trial court's *admission* of expert testimony should apply to *post-admission* decisions regarding such testimony. The Ninth Circuit's opinion erroneously holds, in conflict with this Court's decision in *Kumho*, that an appellate court can substitute its judgment for the district court's discretion with respect to evaluating expert testimony.

As pointed out in the Appraisal Institute's *amicus* brief in support of petitioners' motion for rehearing in the Ninth Circuit, the trial court's "gatekeeping" function, and adherence to the appropriate deferential appellate standard of review of gatekeeping decisions, is especially important in a case like this where an expert was permitted to testify *without* rendering any actual opinion regarding the land's value. The Ninth Circuit's holding that expert testimony discounted by the district court outweighed even the government's own expert valuation opinion constitutes a subversion of the district court's role as "gatekeeper."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GERALD MALTZ
Counsel of Record
HARALSON, MILLER, PITT
& MCANALLY, P.L.C.
One South Church Avenue,
Suite 900
Tucson, Arizona 85701-1620
(520) 792-3836

G. LAWRENCE SCHUBART
STUBBS & SHUBART, P.C.
340 North Main Avenue
Tucson, Arizona 85701-0547
(520) 623-5466

October 12, 1999

Counsel for Petitioners

UNITED STATES of America,
Plaintiff-Appellant,

v.

4.0 ACRES OF LAND, more or less, situated in the City of Tucson, Pima County, State of Arizona, Defendant,

and

Allan J. Norville; Alfena A. Norville, wife, Defendants-Appellees.

No. 98-15144.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Feb. 11, 1999.

Decided May 4, 1999.

Jeffrey C. Dobbins, United States Department of Justice, Washington, D.C., for the plaintiff-appellant.

C. Lawrence Schubart, Stubbs & Schubart, Tucson, Arizona, for the defendants-appellees.

Appeal from the United States District Court for the District of Arizona; Jack D. Shanstrom,[1] District Judge, Presiding. D.C. Nos. CV 95-00131-JDS, CV 95-00763-JDS (Consolidated).

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[1] The Honorable Jack D. Shanstrom, United States District Judge of the District of Montana, sitting by designation as the trial judge.

Before: FLETCHER and TASHIMA, Circuit Judges, and FITZGERALD,[2] District Judge.

FLETCHER, Circuit Judge:

Allan J. Norville, a property owner in Tucson, Arizona, sought just compensation for his land that the United States condemned for a new federal courthouse building. After the first jury awarded $2.5 million, the district court granted Norville's motion for a new trial.

Upon retrial, the second jury returned a verdict of $8.4 million. On appeal, the United States asserts that the original jury verdict should not have been set aside and that the court's evidentiary rulings in the second trial deprived the jury of key information necessary to determine just compensation. We have jurisdiction pursuant to 28 U.S.C. § 1291. We conclude that the district court erred in granting a new trial; we reinstate the original jury verdict.

FACTUAL and PROCEDURAL BACKGROUND

Developer Allan J. Norville ("Norville") owns 11 acres of land on the west side of downtown Tucson, Arizona. In 1994, the General Services Administration identified the four-acre northwest corner of Norville's 11-acre property for a new federal courthouse. Located at the corner of Congress and Granada Streets, the property is five blocks from the existing courthouse, and is vacant except for a parking lot on one portion and temporary

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[2] The Honorable James M. Fitzgerald, United States Senior District Judge, District of Alaska, sitting by designation on the Court of Appeals.

structures that Norville constructed for an annual gem show that he hosts. It has water, electricity, and multiple phone lines that Norville installed. The United States condemned the land in October 1995 and estimated its value at $1,933,000. Norville objected to the valuation and sought a jury trial to determine the appropriate compensation.[3]

1. The First Trial

A nine-day jury trial occurred in February, 1997. The parties stipulated that Norville's "larger parcel" consisted of 11.3 acres, rounded to 475,050 square feet and that the land condemned for the courthouse was four acres, or 300,800 square feet.[4] The "just compensation" figure in this case is the difference in the value of the 11-acre parcel "before" the taking and the remaining seven-acre parcel "after" the taking. To determine just compensation, the appraisers estimated a price-per-square foot "before" the taking for the larger, 11-acre parcel, and a price-per-square foot "after" the taking for the remaining seven-acre parcel.

The parties differed in their opinions of the highest and best use of the property before and after the taking. Relying on the property's potential for development as a hotel, retail shops, and exhibition hall, Norville claimed

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[3] Appropriate compensation may be determined by a jury or based on the report of a three-member commission appointed by the district court pursuant to Fed.R.Civ.P. 71A(h).

[4] The parties agreed to these estimates of square footage and these numbers were used on the verdict forms in both trials.

that just compensation exceeded $14 million. His appraisers calculated the value of the original eleven acre parcel, projected to be built out with a 500-room hotel and 50,000 square foot exhibition hall, at $38 per square foot before the taking. Because they forecast that the only reasonable use of the seven acres remaining after the condemnation would be for overflow parking or an unidentifiable investment for some unknown future use, they estimated a value of $11.94 per square foot after the taking. These computations resulted in "just compensation" of $14,460,348.

The government's appraiser, William Peterson, estimated just compensation at $3.2 million, using a value of $10.75 per square foot ($5,107,000) before the taking and $6.99 per square foot ($2,105,000) for the remaining property after the taking. He testified that holding the property for future investment was the highest and best use of the property because there was no current demand in Tucson for a high-rise hotel or retail space.

In addition to its own in-house appraiser, the government relied on Gene Dilmore ("Dilmore"), an independent appraiser, as a rebuttal witness. Dilmore had developed a widely used computer program for making density adjustments to the comparable sales that are used to derive accurate valuations for a subject property. Dilmore testified that Norville's appraisers had erred in their density adjustments to comparable sales, resulting in an inflated valuation for Norville's property.[5] Using

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[5] Density adjustments are used when comparing the sales prices of land and buildings of different sizes.

the same comparables and other assumptions as those used by Norville's appraisers, but properly corrected for density adjustments, Dilmore testified that their data would yield a just compensation value of $12.46 per square foot, or $1.4 million.

Dilmore emphasized that he was "not attempting to appraise the subject property" but that his analysis established "that the proper application of size adjustments to the proper pricing unit square foot of building built or allowable, whether using [Norville's appraisers'] sales as is, or as modified in the Corbett report, gives results extremely different from those in [Norville's appraisers'] report." The role of Dilmore's testimony has some bearing on whether competent evidence supported the jury's verdict and whether the verdict was outside the range of the evidence.

The government also called Susan Corbett ("Corbett"), another appraiser, as a rebuttal witness. Corbett testified that Norville's appraisers generated inflated valuations because they erred in their choice of comparables. Using the comparables that Corbett recommended, Dilmore derived a value of $8.04 per square foot. Corbett also testified that, although there was no significant change in the market over the last several years, Norville's appraisers had previously appraised the same property in 1990 and 1992, and estimated values of $10.68 – $14 per square foot, substantially lower than the $38 value they testified to at trial.

The jurors also heard Norville testify that he did not want to lose any of his land and that he "never wanted the courthouse on my property." To impeach Norville on

this point, the United States called the Hon. William D. Browning, a district judge in Tucson, who had been the Chief Judge in 1993, and the judge responsible for overseeing plans for the new courthouse.[6] Norville insists that Judge Browning's appearance and testimony were unfair.

Judge Browning testified that Norville contacted him in 1993, before Norville's property was selected for the courthouse, and suggested that the new courthouse should be built on his land. According to Judge Browning, Norville suggested that he would build a hotel next to the courthouse that would share a garage with the courthouse. Norville declined to cross-examine Judge Browning. In addition to Judge Browning's testimony countering Norville's purported desire not to have the courthouse on his property, the government played a videotape showing Norville testifying to the County Council in 1996 about a project on his land that would include the courthouse.

A jury awarded "just compensation" of $2,526,625,[7] which reflected a valuation of $6,888,225 ($14.50 per square foot) "before" the taking and $4,361,600 ($14.50

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[6] Before allowing Judge Browning to testify, the district court allowed the parties to brief the issue of whether Judge Browning should be allowed to testify and to conduct voir dire of Judge Browning.

[7] The total jury award was $2,702,625, which included $160,000 for the value of site improvements and $16,000 for a "temporary take," the rental value of the property taken before the title transferred. The parties stipulated to these amounts, which remained unchanged in each trial. Thus, only the "just compensation" figures for the land itself are used for comparison here.

per square foot) for the remaining property "after" the taking. The jury award was lower than the government's appraisal but higher than the $1.4 million estimate that Dilmore derived using Norville's numbers adjusted for density. When the award is parsed on a per square foot basis, the "before" valuation falls between the values offered by the government and Norville, whereas the "after" valuation is higher than either party suggested. The jury apparently disagreed with the appraisers that the remaining seven acres would decline in value after condemnation and, therefore, declined to award "severance" damages. Norville insists that the jury's failure to award severance damages justified a new trial.

2. *Post-Trial Motions*

After the jury announced its verdict, a newspaper article appeared in the *Arizona Daily Star* on March 1, 1997. The article quoted a juror who explained that Judge Browning's testimony convincingly undermined Norville's assertion that he never wanted the courthouse on his property.

Norville, dissatisfied with the jury award, filed a motion for new trial pursuant to Fed.R.Civ.P. 59, alleging that the verdict was (1) against the weight of the evidence because it was outside the range of qualified opinion testimony and failed to award severance damages; (2) the product of prejudice or tainted by the misconduct of counsel; (3) the product of inadmissible and/or overwhelmingly prejudicial testimony by Judge Browning and testimony concerning certain comparable sales; and (4) that the verdict unjustly deprived Norville of "full and

fair" just compensation. After hearing, the district court granted Norville's motion for a new trial.

The judge concluded that the verdict was "against the weight of the evidence" because he thought that the verdict was "outside the range of the testimony in evidence is not supported and that the – fact that there was no severance damage given, I think that is overwhelming." The judge also commented that

> I am deeply disturbed [about] the effect of Judge Browning's testimony. I feel I was err [sic] in that and it's difficult for me to admit that I was in error but when I heard the way the evidence was used and the testimony was used, the fact that he hadn't been disclosed as a witness in advance . . . I feel that that was a err [sic] on the Court in allowing that testimony in.

The source of the judge's discomfort appeared to be the newspaper article that appeared shortly before Norville filed his motion for a new trial, as the judge said that "the only thing I know about the post verdict was the newspaper article that I read. And in that one of the jurors said that they gave overwhelming weight to Judge Browning's testimony."

In addition to expressing concerns about Judge Browning's testimony, the judge added that "I don't feel that . . . Mr. Dilmore's testimony supports the verdict because he was not offering anything with respect to value. It was [a] non-opinion as to value." Together, those factors apparently convinced the court that the verdict was "against the weight of the evidence" and a "miscarriage of justice" and required a new trial.

The United States filed a motion urging the court to reconsider its decision to grant a new trial. The government also offered to consent to an additur of $475,375, raising the total compensation to $3,178,000,[8] the value provided by its appraiser, Mr. Peterson. The district court denied its motion.

3. The Second Trial

Before the second trial commenced, the district court granted Norville's in limine motion to exclude Judge Browning's testimony and any reference, by any witness, to Norville's discussions with Judge Browning. The court also excluded Corbett's testimony. Her testimony would have rebutted the testimony of Norville's appraisers.

For the second trial, Norville hired two new appraisers, Herbert Havins and Donald Duncan. Havens appraised the property at $28 per square foot before the taking and $12 per square foot after the taking, making just compensation, $9,691,800. Duncan also appraised the property at $28 before, but only $8 after, making just compensation, $10,895,000. The government introduced the appraisal of Jay Vance who testified that the "before" value was $9 per square foot and the "after" value was $7.50, making just compensation $1.9 million. The second

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[8] The $3,178,000 reflects Peterson's condemnation value of $3,002,000 plus the stipulated values of $176,000 for site improvements and rental value. The jury verdict of $2,702,625 plus the government's proposed additur would rise Norville's total compensation to $3,178,000, the total value that Peterson testified to at trial.

jury awarded $8,213,000 as just compensation.[9] The United States timely appealed the court's decision to grant a new trial following the first trial and challenged the court's evidentiary rulings in the second trial.

STANDARD OF REVIEW

We review for an abuse of discretion a district court's grant of a new trial. *Anheuser-Busch v. Natural Bev. Distributors*, 69 F.3d 337, 346 (9th Cir.1995); *Roy v. Volkswagen of America, Inc.*, 896 F.2d 1174, 1176 (9th Cir.1990), *amended*, 920 F.2d 618 (1991). The trial court may grant a new trial, even though the verdict is supported by substantial evidence, if "the verdict is contrary to the clear weight of the evidence, or is based upon evidence which is false, or to prevent, in the sound discretion of the trial court, a miscarriage of justice." *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440, 1452 (9th Cir.1988). We must uphold the district court if any of its grounds for granting a new trial are reasonable. *Id.* The corollary, of course, is that a district court may not grant or deny a new trial merely because it would have arrived at a different verdict. *Wilhelm v. Associated Container Transp. (Australia) Ltd.*, 648 F.2d 1197, 1198 (9th Cir.1981). Thus, we may find that a district court abused its discretion in ordering a new trial if the jury's verdict is not against the clear weight of the evidence. *Roy*, 896 F.2d at 1176.

We also review for abuse of discretion a district court's decision to exclude expert testimony. *McKendall v.*

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[9] With the addition of $176,000 in stipulated compensation, the total jury award was $8,389,099.

Crown Control Corp., 122 F.3d 803, 805 (9th Cir.1997). In this case, however, we need not rule on whether evidence was properly excluded in the second trial because we hold that the district court abused its discretion in granting the second trial.

ANALYSIS

1. Just Compensation

Under the Fifth Amendment of the Constitution, the government may not take private property for public use without paying "just compensation" to the owner. U.S. CONST. amend. V. Where the taking is a partial taking, "just compensation" is the difference between the fair market value of the whole parcel immediately before the taking and the remainder after the taking. *See United States v. Miller*, 317 U.S. 369, 376, 63 S.Ct. 276, 87 L.Ed. 336 (1943). A "partial taking" occurs where, as here, the government condemns only a portion of the landowner's property. *Id.* ("the owner's compensation for that taking includes any element of value arising out of the relation of the part taken to the entire tract."); *see also* 71 Nichols on Eminent Domain § 12.03. If the value of the remaining land, on a unit basis, diminishes when the condemned parcel is removed from the larger whole, the landowner is entitled to compensation "both for that which is physically appropriated and for the diminution in value to the non-condemned property." *U.S. v. 33.5 Acres, Okanogan County*, 789 F.2d 1396, 1398 (9th Cir.1986). The diminution in value of the remaining property is called "severance damages." *Id. See also, Miller*, 317 U.S. at 376. Alternatively, if the taking benefits the remainder, "the benefit

may be set off against the value of the land taken." *Miller*, 317 at 376.

A condemnation action awards "just compensation" to the property owner whose property has been taken by the government. *United States v. Reynolds*, 397 U.S. 14, 16, 90 S.Ct. 803, 25 L.Ed.2d 12 (1970); *McCandless v. United States*, 298 U.S. 342, 348, 56 S.Ct. 764, 80 L.Ed. 1205 (1936). There is no Seventh Amendment right to a jury trial in a condemnation action. *Reynolds*, 397 U.S. at 18; *see also* Fed.R.Civ.P. 71A(h). However, if a party elects a jury, it is the jury that determines just compensation "within ground rules established by the trial judge." *Reynolds*, 397 U.S. at 20; Fed.R.Civ.P. 71A(h). The property owner bears the burden of proving the value of the condemned land. *US ex rel. TVA v. Powelson*, 319 U.S. 266, 273, 63 S.Ct. 1047, 87 L.Ed. 1390 (1943).

2. *New Trial*

The district court granted a new trial because it concluded that Judge Browning's testimony was improperly admitted and that the award was against the weight of the evidence. If either ground could support a new trial, we may not reverse that decision. Norville insists that his seven acres remaining after condemnation have dramatically diminished in value on a per-square-foot basis compared to the value per square foot of his full 11-acre parcel. He argues, and the district court agreed, that the jury's failure to award severance damages resulted in an award outside the range of the evidence and contrary to the expert testimony. We disagree. When the evidence is

viewed in its entirety, the jury award was consistent with the weight of the evidence.

a. Judge Browning's testimony

The district court relied heavily on its perception that the jury misused or was impermissibly prejudiced by Judge Browning's testimony. The only evidence of the impact of Judge Browning's testimony, however, is the newspaper article, published after the trial, which quoted one juror as saying

> It stuck out to me a lot due to the fact that (Norville) said he never, ever wanted the courthouse in that corner of the property. . . . Judge Browning pointed to that corner of the property and said (Norville) wanted it here. I highly doubt that Judge Browning would lie in his own federal court, so I had to go with him.

A juror's observations may not be used as grounds to grant a new trial absent exceptional circumstances. Rule 606(b) of the Federal Rules of Evidence prohibits a juror from testifying about the jury's deliberations or how the jurors reached their conclusions unless "extraneous prejudicial information was improperly brought to the jury's attention." Neither party alleges that extraneous prejudicial information was brought to the jury's attention. Rule 606(b) also prohibits any evidence of any statement by a juror "concerning a matter about which the juror would be precluded from testifying" from being used in an inquiry into a jury's verdict. There was no official inquiry into the jury's verdict in this case. Apparently, the juror's post-verdict statements to the press distorted the lens

through which the district court viewed the verdict. The statements should not have been considered.[10]

Judge Browning, as the judge in charge of the courthouse relocation project, possessed first hand knowledge concerning Norville's efforts to generate interest in his property for the courthouse. Judge Browning's testimony undercut Norville's testimony that the remaining land would be less desirable, and hence, less valuable, if the courthouse was built on the northern four acres.

Judge Browning's testimony may have influenced the jury's decision not to award severance damages, but the influence was not improper. The jury was entitled to conclude that Norville, an experienced developer in Tucson, would not have sought out the courthouse for his property if he thought it would diminish the value of his remaining property. Moreover, the parties fully briefed the issues surrounding Judge Browning's testimony before he was allowed to testify. There were no surprises at trial. Norville declined to cross examine Judge Browning and neither party requested limiting instructions regarding the jury's use of Judge Browning's testimony. We conclude, therefore, that Judge Browning's testimony was properly admitted.

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[10] If we ignore for the moment the court's improper use of the juror's statements, those statements, taken in context, do not support the court's decision to grant a new trial. The balance of the quotes from the juror explained that the jury carefully considered the full range of evidence presented and did not find Norville's appraisers credible. For example, the same juror stated, "[t]hey never proved to us that the market wanted what the Norvilles said they wanted to do. . . . We couldn't accept his vision (for) the future. I just don't see it happening."

b. Size of Jury Award

We must next determine whether the jury award was outside the range of the evidence. Norville insists that the "scope of the evidence rule" in condemnation cases requires that the fact finder award a value between the extremes of the expert valuations. *See e.g., United States v. 1,162.65 Acres of Land,* 498 F.2d 1298, 1301, n. 5 (8th Cir.1974) ("The rule is that an award of just compensation will not be disturbed if it is within the scope of the evidence . . . [which generally means] determining whether the award falls within the extremes of the adverse parties' experts' opinion testimony."). We have found no case that requires a jury award to fall between the extremes of expert appraisals without regard to other testimony that may bear on the property's valuation or that bears on the knowledge or credibility of the appraisers. In fact, we find just the opposite. Courts have rejected a rigid application of the scope of the evidence rule. *See e.g., 1,162.65 Acres of Land,* 498 F.2d at 1301, n. 5 ("where the totality of the evidence supports the award it will be upheld notwithstanding the fact it is outside the range of all the experts' valuations."). "The awarding of [a] lesser sum, or other difference of opinion between the trier of the facts and the witnesses, does not necessarily dictate the setting aside of the award. . . . especially . . . if there is other evidence upon which the award has been based." Nichols on Eminent Domain, § 17.3, 17-42.

Here, we find ample evidence that supports the jury's decision to depart from the appraisers' recommendations. Although Norville observes, correctly, that Dilmore never appraised the property and did not offer his own, independent valuation, that observation misses

the point. Dilmore was a rebuttal witness, not an independent appraiser. He accepted Norville's appraisers' data and their basic assumptions. His role, like that of Corbett, was to expose flaws in their use of the data and to offer a "corrected" valuation.

Much of Norville's argument relies on the absence of severance damages in the jury's award. He belabors the point that the jury's failure to award severance damages is dispositive because every expert testified to a diminished value of the land remaining after the taking. The jury's award translates into $14.50 per square foot before and after condemnation. We, of course, do not know whether the jury calculated its award on a per-square-foot basis, or whether it simply determined total "before" and "after" values, as the verdict form asked only for the total valuations. Even if we assume that the jury deliberately assigned identical before and after per-square-foot values, this suggests that the jury rejected the appraisers' contentions that the remaining seven acres was diminished in value after the courthouse corner was taken, and simply declined to award "severance damages."

The jury's valuation of $14.50 per square foot before condemnation falls between Norville's estimate of $38 and the government's estimate of $10.75. The $14.50 after condemnation figure, however, is higher than either Norville's value of $11.94 or the government's estimate of $6.99 per square foot. The United States contends that the jury's decision not to reduce the "after" value reflected a "reasonable compromise" that Norville was "unlikely to suffer any significant loss in value on the remaining property." The jury heard testimony from which it could have reasonably concluded that Norville's remaining

seven acres would not diminish in value after the taking. Its verdict, therefore, was not against the clear weight of the evidence.

The government urges us not to view the "after" award in isolation. We agree that we cannot isolate the "after" award from testimony that might bear on whether the remaining property would diminish in value. The "totality of the evidence" approach that looks beyond the specific numbers used in the expert opinions is appropriate. *See 1,162.65 Acres of Land*, 498 F.2d at 1301. This approach reflects the discretion accorded the jury in weighing the credibility of witnesses and looking critically at experts' analyses. We cannot conclude, as Norville urges, that each component of the jury's award must be within the range of each component of expert testimony, and that evidence other than the appraisals has no role.[11] Were we to adopt Norville's suggested approach, we would discredit the role of the jury and give unbounded discretion to the district judge to override a jury's verdict. We conclude that, here, the clear weight of the evidence justifies the jury's decision to find Norville's appraisals suspect and to reject the appraisers' assertions of diminished value in the remaining property.

Our conclusion is bolstered by our review of the jury instructions which neither party challenges on appeal. The jury was expressly entrusted with all credibility determinations including whether the evidence that Norville's remaining seven acres would diminish in value

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[11] The government observes that the jury could have reached an identical total valuation with a different combination that included severance damages.

after the taking was reliable. Jury instruction number 11 explained the concept of severance damages. "The owner is entitled to just compensation, not only for the fair market value of the interest actually taken, but also for the amount equivalent to the lowering or diminution of the fair market value, *if any*, of the owner's interest in the remaining land, due to the severance of the land which was taken." (emphasis added). The jury, therefore, was acutely aware of the concept of severance damages. We note especially the following instructions to the jury regarding its consideration of witness testimony:

> # 3: You may disbelieve all or any part of any witness's testimony.
>
> # 4: A witness may be discredited or impeached by contradictory evidence; or by evidence that at some other time the witness has said or done something . . . which is inconsistent with the witness's present testimony. If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.
>
> # 17: The government must pay fair market value for that which it has acquired and *severance damages, if any*, to the remainder, but nothing more. (emphasis added).
>
> # 20: [I]f you should decide that the reasons given in support of a landowner's opinion as to fair market value are not sound, you may reject that opinion; or you may give it any weight you may think it deserves.
>
> # 21: Both sides in this case have offered opinion evidence as showing the value of the property

> taken herein. You are the sole judges of the credibility of the witnesses who have testified before you, and of the weight to be given the testimony of each.
>
> # 22: You should consider each expert opinion received in evidence in this case, and give it such weight as you may think it deserves. If you should decide that any such opinion is not based upon sufficient study, investigation, knowledge, or experience, or if you should conclude that the reasons given in support of the opinion are not sound, you may reject it entirely.
>
> # 25: In determining fair market value, you may consider not only the opinions of the various witnesses, but also other evidence which may assist you such as the location of the property, the surroundings and general environment, any peculiar suitability of the property for particular uses, and the reasonable probabilities as to future potential uses, if any for which the property was suitable or physically adaptable. . . .

"Rule 71A(h) . . . makes clear that a jury in federal condemnation proceedings is to be confined to the performance of a single narrow but important function – the determination of a compensation award *within ground rules established by the trial judge.*" *Reynolds*, 397 U.S. at 20 (emphasis added). Although the judge may "tell the jury the criteria it must follow in determining what amount will constitute just compensation," the "precise issue of the amount of compensation" is left for the jury. *Id.* Nowhere did the judge instruct that the expert opinions were binding on the jury or bounded the value it could assign for just compensation. Neither party complains on appeal that the ground rules in the first trial were wrong.

In light of the jury instructions and the evidence presented, the first jury's verdict should stand. From the totality of evidence, therefore, we cannot conclude that the jury delivered a verdict against the clear weight of the evidence.

CONCLUSION

The district court erred in granting a new trial. Where the jury's verdict is not against the clear weight of the evidence, a district court abuses its discretion in ordering a new trial. *See Roy*, 896 F.2d at 1176. Such is the case here. We find no evidence of impropriety in the jury proceedings or in the jury instructions. The district court should not second-guess a jury verdict based on a juror's statements to the press after a verdict is entered. All of the evidence, including that which weakens appraisers' expert opinions as to the value of the property or the likelihood that the remainder will diminish in value must be considered. Severance damages need not be awarded in every partial takings case. The jury award was not outside the range of evidence presented and a new trial should not have been granted.

We reverse the grant of a new trial and instruct the district court to reinstate the original jury verdict. In light of our ruling, we need not address the United States' contention that the court erred in rejecting its offer of additur instead of a new trial or the alleged errors in the court's pre-trial rulings in the second trial.

REVERSED with directions.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. 4.0 ACRES OF LAND, more or less, situated in the City of Tucson, Pima County, State of Arizona, Defendant, and ALLAN J. NORVILLE; ALFENA A. NORVILLE, wife, Defendants-Appellees.	No. 98-15144 D.C. No. CV 95-131-TUC-JDS CV 95-763-TUC-JDS (Consolidated) ORDER (Filed Jul. 14, 1999)

Before: B. FLETCHER and TASHIMA, Circuit Judges, and FITZGERALD,[1] District Judge

The panel has voted unanimously to deny the petition for rehearing and to reject the petition for rehearing en banc. Judge Tashima voted to deny the petition for rehearing and the petition for rehearing en banc. Judges

[1] The Honorable James M. Fitzgerald, United States Senior District Judge, District of Alaska, sitting by designation on the Court of Appeals.

B. Fletcher and Fitzgerald voted to deny the petition for rehearing and recommended rejection of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. 35(b).

The petition for rehearing is denied and the petition for rehearing en banc is rejected.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 98-15144
CT/AG#: CV-95-00763-JDS

UNITED STATES OF AMERICA

Plaintiff - Appellant

v.

4.0 ACRES OF LAND, more or less, situated in the City of Tucson, Pima County, State of Arizona

Defendant

and

ALLAN J. NORVILLE; ALFENA A. NORVILLE, wife

Defendants - Appellees

[Stamp:
A TRUE COPY
CATHY A.
CATTERSON
Clerk of Court
ATTEST
JUL 22 1999
by:
_____]
Deputy Clerk

(Filed July 26, 1999)

APPEAL FROM the United States District Court for the District of Arizona (Tucson).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Tucson) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is REVERSED. Filed and entered May 4, 1999

COSTS TAXED